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Date:

SUPERIOR COURT, RENE C. DAVIDSON COURTHOUSE
COUNTY OF ALAMEDA, STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA	
v.	No.
	Department
Defendant.	

BENCH MEMORANDUM RE: *BATSON-WHEELER* MOTIONS

I.
WHAT IS A *BATSON-WHEELER* MOTION?

"[T]he use of peremptory challenges to remove prospective jurors on the sole ground of group bias violates the right to trial by jury drawn from a representative cross-section of the community under article I, section 16, of the California Constitution." (***People* v. *Wheeler*** (1978) 22 Cal.3d 258, 276-277.)

"[T]he Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." (***Batson* v. *Kentucky*** (1986) 476 U.S. 79, 89.)

A ***Batson-Wheeler*** motion is motion made by one of the parties claiming that the other party has exercised a challenge against a juror based on the juror's membership in a cognizable group (i.e., "an identifiable group distinguished on racial, religious, ethnic, or similar grounds[.]" (***People v. Wheeler*** (1978) 22 Cal.3d 258, 276.) It is an **extremely serious** allegation of egregious misconduct. Indeed, the allegation itself can cause irreparable harm to the reputation of the party against whom it is made. If true, such misconduct justifiably merits condemnation and sanction. On the other hand, if the motion is not made in good faith, but as a litigation tactic, such misuse of the motion merits equal condemnation.

II.
BATSON-WHEELER PROCEDURE IN A NUTSHELL

The three-step inquiry governing ***Batson-Wheeler*** claims is well established. "First, the trial court must determine whether the defendant has made a prima facie showing that the prosecutor exercised a peremptory challenge based on race. Second, if the showing is made, the burden shifts to the prosecutor to demonstrate that the challenges were exercised for a race-neutral reason. Third, the court determines whether the defendant has proven purposeful discrimination. The ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." (***People* v. *Lomax*** (2010) 49 Cal.4th 530, 569; ***People v. Lenix*** (2008) 44 Cal.4th 602, 612-613.)

III.
DOES A TRIAL COURT HAVE ANY OBLIGATIONS IT MUST FULFILL IN ***ANTICIPATION*** OF A *BATSON-WHEELER* MOTION?

There are three primary obligations imposed on trial judges to help ensure that ***if*** a ***Batson-Wheeler*** motion is made, it may properly be addressed.

First, the trial court should make an order requiring that any ***Batson-Wheeler*** challenge be made outside the presence of the jury, i.e., by way of side bar conference. (**See *People* v. *Willis*** (2002) 27 Cal.4th 811, 822 [noting to ensure against undue prejudice to the party unsuccessfully making a peremptory challenge, courts may employ the procedure of using sidebar conferences followed by appropriate disclosure in open court as to successful challenges].)

Second, the trial court **must** pay close attention during jury selection so as to be able to verify or dispute representations made by counsel regarding their observations of the jurors' verbal responses, conduct (in and outside of the jury box), attitudes, body language, and other nonverbal behavior that may bear on the propriety of peremptory challenges. (**See *Thaler v. Haynes*** (2010) 130 S.Ct. 1171, 1174 ["where the explanation for a peremptory challenge is based on a prospective juror's demeanor, the judge should take into account, among other things, *any observations of the juror that the judge was able to make during the voir dire*"]; ***Snyder v. Louisiana*** (2008) 128 S.Ct. 1203, 1208 ["race neutral reasons for peremptory challenges often invoke a juror's demeanor (e.g., nervousness, inattention) making the trial court's first-hand observations of even greater importance"]; ***People v. Lenix*** (2008) 44 Cal.4th 602, 625 [citing to for the proposition that the "trial court bears a 'pivotal role in evaluating ***Batson*** claims,' for the *trial court must evaluate* the demeanor of the prosecutor in determining the credibility of proffered explanations, *and the demeanor of the panelist when that factor is a basis for the challenge"*], emphases added.)

Third, "trial courts must give advocates the opportunity to inquire of panelists and make their record. If the trial court truncates the time available or otherwise overly limits voir dire, unfair conclusions might be drawn based on the advocate's perceived failure to follow up or ask sufficient questions. Undue limitations on jury selection also can deprive advocates of the information they need to make informed decisions rather than rely on less demonstrable intuition." (***People v. Lenix*** (2008) 44 Cal.4th 602, 625.)

IV.
RELEVANT PRINCIPLES GOVERNING HOW A TRIAL COURT SHOULD PROCEED WHEN A *BATSON-WHEELER* MOTION HAS BEEN MADE?

As noted above, for both federal and state constitutional claims, there is a **three-step** inquiry whenever a ***Batson-Wheeler*** challenge is made. (***People* v. *Lenix*** (2008) 44 Cal.4th 602, 612-613.)

A. First Step (The Prima Facie Case)

In the first step, the party objecting to the challenge has the burden of making out a

prima facie case of discrimination. This is done "by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose." (***Johnson v. California*** (2005) 545 U.S. 162, 168.)

In determining whether this burden has been met, courts must keep in mind that "[s]ubject to rebuttal, a ***presumption exists that a peremptory challenge is properly exercised***, and the burden is upon the opposing party to demonstrate impermissible discrimination against a cognizable group." (***People* v. *Salcido*** (2008) 44 Cal.4th 93, 136; ***People* v. *Neuman*** (2009) 176 Cal.App.4th 571, 579, emphasis added.)

The California Supreme Court has identified what a trial court may consider in assessing whether a prima facie case has been made:

> Though proof of a prima facie case may be made from any information in the record available to the trial court, we have mentioned "certain types of evidence that will be relevant for this purpose. Thus the party may show that his opponent has struck most or all of the members of the identified group from the venire, or has used a disproportionate number of his peremptories against the group. He may also demonstrate that the jurors in question share only this one characteristic-their membership in the group-and that in all other respects they are as heterogeneous as the community as a whole. Next, the showing may be supplemented when appropriate by such circumstances as the failure of his opponent to engage these same jurors in more than desultory voir dire, or indeed to ask them any questions at all. Lastly, ... the defendant need not be a member of the excluded group in order to complain of a violation of the representative cross-section rule; yet if he is, and especially if in addition his alleged victim is a member of the group to which the majority of the remaining jurors belong, these facts may also be called to the court's attention." (***People* v. *Bell*** (2007) 40 Cal.4th 582, 597.)

In addition, a court may consider whether the prosecutor has passed on panel containing jurors who are members of the cognizable class at issue (see ***People* v. *Streeter*** (2012) 54 Cal.4th 205, 224; ***People* v. *Dement*** (2011) 53 Cal.4th 1, 20; ***People* v. *Clark*** (2012) 52 Cal.4th 856, 903-908; ***People* v. *Carasi*** (2008) 44 Cal.4th 1263, 1294-1295) and/ or fought to keep such jurors over a defense challenge for cause (**see *People* v. *Streeter*** (2012) 54 Cal.4th 205, 224;

People* v. *Jones (2011) 51 Cal.4th 346, 362). Whether there is evidence of the historical practice of the prosecutor or the prosecutor's office of discriminatory jury selection practice is also relevant in assessing whether an inference of discriminatory purpose can arise. (**See *Miller-El v. Dretke*** (2005) 545 U.S. 231, 253, 264-266.)

Finally, a court may consider whether its *own* observations of the jurors suggested neutral grounds for the challenges made by the prosecutor. (***People* v. *Neuman*** (2009) 176 Cal.App.4th 571, 580.)

Some common issues that arise at the first stage of the ***Batson-Wheeler*** motion are discussed below:

Can a challenge to a single member of a cognizable class establish a prima facie case?

Although the term "systematic exclusion" is sometimes used "to describe a discriminatory use of peremptory challenges, . . . [t]he term is not apposite in the ***Wheeler*** context, for a single discriminatory exclusion may violate a defendant's right to a representative jury." (***People* v. *Fuentes*** (1990) 54 Cal.3d 707, 716, fn. 4; **accord *People* v. *Taylor*** (2010) 48 Cal.4th 574, 642**; *People* v. *Montiel*** (1993) 5 Cal.4th 877, 909; **see also *People* v. *Reynoso*** (2003) 31 Cal.4th 903, 927, fn. 8 ["the unconstitutional exclusion of even a single juror on improper grounds of racial or group bias requires the commencement of jury selection anew"].)

It is **not** necessary that the party making a ***Batson-Wheeler*** challenge show a "pattern of systematic exclusion." Rather, one way of making a showing of a prima facie case is by showing a pattern of systematic exclusion. (**See *People* v. *Avila*** (2006) 38 Cal.4th 491, 549.) That being said, it important to understand why challenging one or two members of a cognizable group will rarely, if ever, ***by itself***, establish a prima facie case of purposeful discrimination ***in the absence of*** any additional evidence of purposeful discrimination.

This is because when the party making the ***Batson-Wheeler*** motion can point to no evidence ***other than*** the fact a party has challenged one or two members of cognizable group, the party is essentially asking the court to draw an inference of discrimination from the fact one party has excused 'most or all' members of the cognizable group," and thus is "necessarily relying on an apparent pattern in the party's challenges" (***People v. Bell*** (2007) 40 Cal.4th 582, 598, fn. 3.) In ***that*** situation, while it is possible to imagine circumstances "in which a

prima facie case could be shown on the basis of a single excusal, in the ordinary case . . . to make a prima face case after the excusal of only one or two members of a group is very difficult." (***Bell***, at p. 598, fn. 3; **accord** ***People* v. *Bonilla*** (2007) 41 Cal.4th 313, 343; ***People v. Hamilton*** (2009) 45 Cal.4th 863, 899 [agreeing with trial judge that the challenge of the only [African-American] subject to challenge was insufficient *in and of itself* to suggest a pattern].) Simply put, as a practical matter, "the challenge of one or two jurors can rarely suggest a pattern of impermissible exclusion." (***People* v. *Bell*** (2007) 40 Cal.4th 582, 598 [and noting that where there is a very small number of panelists falling into the cognizable class, it is impossible to draw an inference of discrimination from the fact that the prosecutor challenged a large percentage of the panelists falling into the class, i.e., two of a total of three]; **see also** ***People* v. *Garcia*** (2011) 52 Cal.4th 706, 744-750 [noting it is "'impossible,' as a practical matter, to draw the requisite inference where only a few members of a cognizable group have been excused and no indelible pattern of discrimination appears"]; ***People* v. *Christopher*** (1991) 1 C.A.4th 666, 672, 673 [challenge of one or two prospective jurors of same racial or ethnic group as defendant, even when panel contains no other members of group, does not establish prima facie case unless there is significant supporting evidence].)

Obviously, the greater the number of members of the cognizable group at issue challenged by the party accused of violating ***Batson-Wheeler***, the greater the likelihood an inference of impermissible exclusion will arise. (**See e.g., *Miller-El* v. *Dretke*** (2005) 545 U.S. 231, 240-241 [fact nine of ten African-Americans struck considered in finding discriminatory use].) However, in the absence of any evidence ***other than*** sheer numbers, courts routinely reject the argument that the burden of making a prima facie case has been met just because multiple members of a cognizable group have been challenged. (**See *People* v. *Taylor*** (2010) 48 Cal.4th 574, 643 [fact prosecutor exercised three of ten peremptory challenges to excuse two African-American prospective jurors and one Hispanic prospective juror "without more, is insufficient to create an inference of discrimination, especially where, as here, the number of peremptory challenges at issue is so small"]; ***People v. Hawthorne*** (2009) 46 Cal.4th 67, 79-80, [no prima facie showing where the defendant's motion was based solely on the assertion that the prosecutor used three of 11 peremptories to excuse African-American prospective jurors]; ***People* v. *Bonilla*** (2007) 41 Cal.4th 313, 343-344 [excusal of three out of four Hispanics, in a case where defendant was also Hispanic, did not create a prima facie case];

People v. Bell (2007) 40 Cal.4th 582, 598 [excusal of two out of three African-Americans did not create prima facie showing]; ***People v. Box*** (2000) 23 C.4th 1153, 1185 [no prima facie case where basis for claim was that two prospective jurors were both African-American and so was the defendant]; ***People* v. *Jones*** (1998) 17 C.4th 279, 293 [evidence supported ruling that there was no prima facie case of group bias in peremptory challenges of four African-Americans even though challenges left no African-American jurors on panel]; ***People* v. *Crittenden*** (1994) 9 C.4th 83, 119, 120, fn. 3 [excusal of all members of defendant's race does not automatically establish prima facie case; declining to follow contrary holdings of lower federal courts]; ***People v. Adanandus*** (2007) 157 Cal.App.4th 496, 503-504 [no prima facie case despite fact three African-American jurors challenged by prosecution where, inter alia, African-American juror remained on panel]; ***People* v. *Allen*** (1989) 212 Cal.App.3d 306, 312, 313 [exclusion of disproportionate number of minority jurors does not by itself establish prima facie case; ***Wheeler*** motion properly denied where record showed specific bias as ground for each of nine peremptory challenges against Blacks and Hispanics]; **cf**. ***Williams* v. *Runnels*** (9th Cir.2006) 432 F.3d 1102, 1103-1107 [use of three of first four peremptories against African-American jurors where only four of the first 49 prospective jurors were African-American was a statistical disparity that alone could create a prima facie showing albeit recognizing other facts could dispel the presumption].)1

Moreover, while a prosecutor's excusal of ***all*** members of a cognizable group may establish a prima facie case, this fact alone is not conclusive to such a showing. (***People* v. *Hoyos*** (2007) 41 Cal.4th 872, 901; ***People* v. *Neuman*** (2009) 176 Cal.App.4th 571, 575.)

Should the trial court engage in a "comparative analysis" at the prima facie level?

Comparative analysis refers to a mechanism that courts use to try to "flush out" the actual motivation of the party accused of using his or her peremptory challenges in a discriminatory fashion. In doing a comparative analysis, the court reviews the reasons given for the challenge as to the particular juror and then looks to see if those reasons would apply

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1. California cases finding no prima facie case prior to the holding in ***Johnson* v. *California*** (2005) 545 U.S. 162 are less persuasive insofar as what constitutes a prima facie showing than post-***Johnson*** cases in light of ***Johnson***'s holding that a prima facie case only requires a defendant challenging a peremptory excusal to show an "inference" the challenge was for an impermissible group bias, rather than the "more likely than not" standard used in California before ***Johnson***. (**Id**. at 168-173.)

equally to other jurors (not belonging to the same cognizable class as the challenged juror) who were not challenged. If there are two jurors who have given very similar responses, one of whom belongs to the cognizable class and one of whom does not, and the party has only challenged the juror in the cognizable class on the purported basis of a response given by both jurors, an inference can arise that the purported basis of the challenge is a pretext designed to conceal a discriminatory purpose. (**See *Miller El v. Dretke*** (2005) 545 U.S. 231, 241; ***Cook* v. *LaMarque*** (9th Cir. 2010) 593 F.3d 810, 815.)

If the trial court reserves ruling on the ***Batson-Wheeler*** motion until after the parties have completed their jury selection, then a properly conducted comparative analysis may be helpful in supporting or dispelling a claim an attorney is exercising a challenge for impermissible reasons.

However, if the trial court decides to rule upon a ***Batson-Wheeler*** motion before jury selection is completed, then comparative analysis is less helpful as a means of supporting an inference the challenges are being exercised for a permissible purpose. This is because the removed jurors may only be compared to other removed jurors. The removed jurors cannot be compared to jurors who have not been removed because it is unknown which jurors still sitting will not later be removed. (**See *People v. Riccardi*** (2012) 54 Cal.4th 758, 796 [declining to consider prospective jurors who were removed by defense peremptory challenges in conducting a comparative analysis because it was "impossible to conclude that the prosecutor had no concerns about [these jurors]" considering that the prosecutor, for tactical reasons, sometimes passed on jurors the prosecution would thereafter challenge"].)

Comparative analysis is generally useless for purposes of determining whether a first stage prima facie case has been established unless the prosecutor proffers reasons for challenging jurors. "Whatever use comparative juror analysis might have in a third-stage case for determining whether a prosecutor's proffered justifications for his [or her] strikes are pretextual, it has little or no use where the analysis does not hinge on the prosecution's actual proffered rationales." (***People* v. *Taylor*** (2010) 48 Cal.4th 574, 617.)

Comparative analysis may also be used to affirmatively support an inference that a prosecutor is not using his or her challenges in an impermissible manner (aka "reverse

comparative analysis"). If there are two jurors who have given very similar responses, one who belongs to the cognizable class and one who does not, and the party has challenged both jurors for the same reason, then an inference can arise that the purported basis of the challenge is not a pretext designed to conceal a discriminatory purpose. (**See *People v. Jackson*** (1996) 13 Cal.4th 1164, 1254.) This form of comparative analysis may potentially be conducted even at the prima facie level if some of the jurors who have been challenged are not from the same cognizable class as the juror who was purportedly improperly struck.

This bench memo discusses "comparative analysis" in greater detail under its discussion of the third stage of a ***Batson-Wheeler*** motion, at pp. 16-17.

Should a court allow the party to state reasons for use of the challenge if the court finds no prima case is made?

If the trial court does not find a prima facie of discrimination, it is not necessary to proceed to the second step; there is no obligation for the prosecutor to disclose any reasons for challenging the panelists; and a trial court is not required to evaluate them. (***People* v. *Carasi*** (2008) 44 Cal.4th 1263, 1292; ***People* v. *Zambrano*** (2007) 41 Cal.4th 1082, 1104-1105 & fn. 3; ***People* v. *Bell*** (2007) 40 Cal.4th 582, 596.)

However, the California Supreme Court has repeatedly ***recommended*** that the judge allow the prosecutor to place his reasons for excusing jurors belonging to the cognizable class on the record, notwithstanding the lack of any prima facie finding. (**See *People* v. *Taylor*** (2010) 48 Cal.4th 574, 616; ***People* v. *Bonilla*** (2007) 41 Cal.4th 313, 343, fn. 13; ***People* v. *Mayfield*** (1997) 14 Cal.4th 668, 723-724.) Indeed, it is recommended that this be done *even before* the trial judge makes its determination that a prima facie case has not been made out by the defense. (***People* v. *Bonilla*** (2007) 41 Cal.4th 313, 343, fn. 13; ***People* v. *Adanandus*** (2007) 157 Cal.App.4th 496, 500.) This is because doing so "may assist the trial court in evaluating the challenge and will certainly assist reviewing courts in fairly assessing whether any constitutional violation has been established." (***People* v. *Bonilla*** (2007) 41 Cal.4th 313, 343, fn. 13; ***People* v. *Adanandus*** (2007) 157 Cal.App.4th 496, 500.)

Second Step: Justifications for Challenge

The second step occurs after a finding that the totality of the relevant facts creates an

inference of discriminatory purpose. Once a prima facie case is made, the "'burden shifts to the [party who originally challenged the juror] to explain adequately the racial [or other cognizable class] exclusion' by offering permissible . . . neutral justifications for the strikes." (***Johnson* v. *California*** (2005) 545 U.S. 162, 168 [bracketed portions and other modifications added by author].) The burden in this second step is merely "the burden of production." (***Paulino* v. *Harrison*** (9th Cir. 2008) 542 F.3d 692, 699.)

The party who originally challenged the juror must then provide a "'clear and reasonably specific' explanation of his 'legitimate reasons' for exercising the challenges." (***People* v. *Lenix*** (2008) 44 Cal.4th 602, 613, citing to ***Batson* v. *Kentucky*** (1986) 476 U.S. 79, 98, fn. 20.)

"Certainly a challenge based on racial prejudice would not be supported by a legitimate reason." (***People* v. *Lenix*** (2008) 44 Cal.4th 602, 613.) On the other hand, a legitimate reason is simply "one that does not deny equal protection" and "a prosecutor may rely on any number of bases to select jurors[.]" (***People* v. *Lenix*** (2008) 44 Cal.4th 602, 613, citing to ***Purkett* v. *Elem*** (1995) 514 U.S. 765, 769.)

"The justification need not support a challenge for cause, and even a 'trivial' reason, if genuine and neutral, will suffice." (***People* v. *Lenix*** (2008) 44 Cal.4th 602, 613.) "A prospective juror may be excused based upon facial expressions, gestures, hunches, and even for arbitrary or idiosyncratic reasons." (**Ibid**; ***People* v. *Mills*** (2010) 48 Cal.4th 158, 176; **see also *Williams v. Rhoades*** (9th Cir. 2004) 354 F.3d 1101, 1109 [noting "demeanor, tone, and facial expressions" may lead to a "hunch" or "suspicion" that the juror might be biased.) The "'second step of this process does not demand an explanation that is persuasive, or even plausible'; so long as the reason is not inherently discriminatory, it suffices." (***Rice* v. *Collins*** (2006) 546 U.S. 333, 338.)

The types of neutral reasons for excusing a juror are too innumerable to list. However, some typical grounds include:

(i) a juror's relative youth and immaturity (s**ee *Rice* v. *Collins*** (2006) 546 U.S. 333, 341; ***People* v. *Salcido*** (2008) 44 Cal.4th 93, 140; ***People* v. *Cruz*** (2008) 44 Cal.4th 636, 657-659);

(ii) a juror's flippant or informal attitude is similarly a legitimate reason for excusing a

juror (**see *Thaler* v. *Haynes*** (2010) 130 S.Ct. 1171, 1172; ***People* v. *Howard*** (2008) 42 Cal.4th 1000, 1017, 1019);

(iii) a juror's reluctance to follow the law (**see *People* v. *Howard*** (2008) 42 Cal.4th 1000, 1017; ***People v. Watson*** (2008) 43 Cal.4th 652, 679-680; ***Gonzalez v. Brown*** (9th Cir. 2009) 585 F.3d 1202, 1205, 1209-1210);

(iv) the juror or close relative of the juror has a criminal background or has had a negative experience with the criminal justice system (s**ee *People* v. *Cruz*** (2008) 44 Cal.4th 636, 656, fn. 3; ***People* v. *Avila*** (2006) 38 Cal.4th 491, 554-555; ***People* v. *Farnam*** (2002) 28 Cal.4th 107, 138);

(v) the juror is skeptical about the fairness of the criminal justice (**see *People v. Elliott*** (2012) 53 Cal.4th 535, 569; ***People* v. *Clark*** (2012) 52 Cal.4th 856, 907; ***People v. Calvin*** (2008) 159 Cal.App.4th 1377, 1386);

(vi) the juror has life experiences that might make the juror overly sympathetic to, or biased towards, a person in the defendant's position (**see *People* v. *Watson*** (2008) 43 Cal.4th 652, 676; ***People* v. *Salcido*** (2008) 44 Cal.4th 93, 140);

(vii) the juror (or close relative of juror) is employed in a job or engages in activities that reflect an orientation toward rehabilitation and sympathy for defendants (**see *People v. Ervin*** (2000) 22 Cal.4th 48, 75; ***People* v. *Neuman*** (2009) 176 Cal.App.4th 571, 586; ***People* v. *Adanandus*** (2007) 157 Cal.App.4th 496, 507; ***People* v. *Barber*** (1988) 200 Cal.App.3d 378, 389-394.)

(viii) the juror is, or appears to be, lying or evasive, and/or gives less than forthright or unbelievable answers (see ***People v. Thomas*** (2011) 51 Cal.4th 449, 472, 475; ***People* v. *Booker*** (2011) 51 Cal.4th 141, 166-167; ***People v. Welch*** (1999) 20 Cal.4th 701, 746);

(ix) the juror has religious beliefs or biases that might affect his or her decision (**see *People* v. *Mills*** (2010) 48 Cal.4th 158, 184; ***People* v. *Richardson*** (2008) 43 Cal.4th 959, 985; ***People* v. *Martin*** (1998) 64 Cal.App.4th 378, 384);

(x) the "juror's attitude, attention, interest, body language, facial expression and eye contact" (***People* v. *Elliott*** (2012) 53 Cal.4th 535, 569; ***People* v. *Lenix*** (2008) 44 Cal.4th 602, 622-623);

(xi) the juror's appearance, including clothing, hairstyle, or other accoutrements (**see *People* v. *Elliott*** (2012) 53 Cal.4th 535, 568-570; ***People* v. *Wheeler*** (1978) 22 Cal.3d 258,

275; ***People* v. *Rushing*** (2011) 197 Cal.App.4th 801, 808.)

(xii) the juror lacks the mental or psychological ability to understand or focus on the issues at trial (**see *People* v. *Davis*** (2008) 164 Cal.App.4th 305, 312-313 ***People* v. *Gutierrez*** (2002) 28 Cal.4th 1083, 1124; ***People* v. *Welch*** (1999) 20 Cal.4th 701, 746);

(xii) the juror previously served on a deadlocked jury (**see *People* v. *Garcia*** (2011) 52 Cal.4th 706, 749; ***People* v. *Farnam*** (2002) 28 Cal.4th 107, 138; ***People* v. *Turner*** (1994) 7 Cal.4th 137, 170);

(xiii) the juror may experience hardship or difficulties in serving that may distract the juror from focusing (**see *People* v. *Clark*** (2012) 52 Cal.4th 856, 907; ***People* v. *Jenkins*** (2000) 22 Cal.4th 900, 994, 1044; ***People* v. *Neuman*** (2009) 176 Cal.App.4th 571, 585-586);

(xiv) the juror or a family member of the juror is unemployed or underemployed (***People v. Thomas*** (2011) 51 Cal.4th 449. 472-473, 475; ***People v. Jones*** (2011) 51 Cal.4th 346, 363 ; ***Stubbs v. Gomez*** (9th Cir.1999) 189 F.3d 1099, 1106).

Some common issues that arise at the second stage of the ***Batson-Wheeler*** motion are discussed below:

Should the court allow a prosecutor to explain his or her reasons for excluding a juror outside the presence of defense counsel?

In general, it is error for a trial court to allow a prosecutor to explain his or her reasons for excluding a particular juror outside the presence of defense counsel and defendant. (**See *People v. Ayala*** (2000) 24 Cal.4th 243, 259-269 [prosecutor's multiple ex parte hearings for justifications were error, albeit harmless] and dis. opn, J. George [hearings were prejudicial error]; ***Ayala v. Wong*** (9th Cir. 2012) 693 F.3d 945 [finding error in ***People* v. *Ayala*** (2000) 24 Cal.4th 243 was prejudicial]; ***United States* v. *Thompson*** (9th Cir. 1987) 827 F.2d 1254, 1260 [reversible error to hold ex parte hearing on prosecutor's explanations]; **but see *United States v. Alcantar*** (9th Cir. 1990) 897 F.2d 436, 438, fn. 2[recognizing a limited exception to this rule in "those instances in which disclosing the reasons for excluding jurors would reveal the prosecutor's case strategy"]; ***United States v. Thompson*** (9th Cir. 1987) 827 F.2d 1254, 125 [same].)

Can a prosecutor challenge a juror based on the prosecutor's own idiosyncratic personal biases against members of a particular profession?

A prosecutor may challenge a juror based on the prosecutor's personal bad luck with members of a particular profession. (**See *People* v. *Rushing*** (2011) 197 Cal.App.4th 801, 812 [citing with approval ***Johnson v. State*** (1996) 266 Ga. 775, 470 S.E.2d 637, 639, a case from Georgia that upheld the challenge to a juror who was a postal worker on the ground that "postal workers, in the prosecutor's experience, do not make good jurors"]; ***People v. Davis*** (2008) 164 Cal.App.4th 305, 313 [upholding prosecutor's challenging a juror who was a certified nursing assistant (CNA) because of the prosecutor's own personal bias against CNAs stemming from the bad experiences the prosecutor had outside of court with CNAs who were working in her father's nursing home, notwithstanding a lack of any assertion that CNAs lean toward the defense from an objective standpoint].)

Third Step: Assessment of Credibility

At the third step, if a "neutral explanation is tendered, the trial court must then decide . . . whether the opponent of the strike has proved purposeful racial discrimination." (***Johnson* v. *California*** (2005) 545 U.S. 162, 168.) The proper focus is on "the ***subjective genuineness*** of the race-neutral reasons given for the peremptory challenge, not on the objective reasonableness of those reasons." (***People* v. *Reynoso*** (2003) 31 Cal.4th 903, 924; ***People* v. *Adanandus*** (2007) 157 Cal.App.4th 496, 506, emphasis added.)

"[T]he issue comes down to whether the trial court finds the prosecutor's race-neutral explanations to be credible. Credibility can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy." (***People* v. *Lenix*** (2008) 44 Cal.4th 602, 613, citing to ***Miller-El* v. *Cockrell*** (2003) 537 U.S. 322, 339; **see also *Lewis v. Lewis*** (9th Cir. 2003) 321 F.3d 824, 830 ["A finding of discriminatory intent turns largely on the court's evaluation of the prosecutor's credibility"].) The trial court has a duty to "assess the plausibility" of the prosecutor's proffered reasons for striking a potential juror, "in light of all evidence with a bearing on it." (***People* v. *Lenix*** (2008) 44 Cal.4th 602, 625.)

In assessing credibility, the court draws upon its contemporaneous observations of the

voir dire. It may also rely on the court's own experiences as a lawyer and bench officer in the community, and even the common practices of the advocate and the office who employs him or her." (***People* v. *Lenix*** (2008) 44 Cal.4th 602, 613, citing to ***People* v. *Wheeler*** (1978) 22 Cal.3d 258, 282.)2

Significantly, this case law makes it clear that when a court finds that a prosecutor has committed a ***Batson-Wheeler*** violation, notwithstanding the fact the prosecutor has presented race-neutral reasons for excusing a juror, the court is finding the prosecutor has lied to the court. The serious nature of this finding helps explain why "[a] presumption exists that a prosecutor has exercised his or her peremptory challenges in a constitutional manner." (***People* v. *Cleveland*** (2004) 32 Cal.4th 704, 732; ***People* v. *Crittenden*** (1994) 9 Cal.4th 83, 114.)

As noted before, "[t]he ultimate burden of persuasion regarding racial motivation rests with, ***and never shifts from, the opponent of the strike***." (***People* v. *Lenix*** (2008) 44 Cal.4th 602, citing to ***Rice* v. *Collins*** (2006) 546 U.S. 333, 338; **see also *Yee* v. *Duncan*** (9th Cir. 2006) 463 F.3d 893, 895, citing ***Purkett* v. *Elem*** (1995) 514 U.S. 765, 768, emphasis added.) This necessarily means that if a court is unsure whether a juror has been removed for discriminatory purposes, or if the reasons for believing a challenge was exercised in a discriminatory fashion do not outweigh the reasons for believing the challenge was made for a non-discriminatory purpose, no finding of a discriminatory purpose should be made.

In making the determination of whether the defendant has proven purposeful discrimination at the third step, the court may take into consideration all the factors it can take

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2. The training provided by Alameda County District Attorney's office on ***Batson-Wheeler*** issues over the past decade has **unequivocally** condemned the discriminatory use of peremptory challenges. New prosecutors are informed that using peremptory challenges in a discriminatory manner in selecting jurors is not only immoral and unethical; it is self-defeating to remove an otherwise favorable juror for the prosecution based on racial or ethnic stereotypes. On the other hand, prosecutors are also cautioned that if they are properly motivated, they must not be dissuaded from exercising a challenge out of fear that they will be subjected to a ***Batson-Wheeler*** challenge (and the attendant possibility that it will be erroneously granted). ***Batson-Wheeler*** motions may arise based on a genuine difference in perspective: a juror who appears to the prosecutor to obviously be a "bad juror" for the prosecution may appear to the defense counsel as a juror who the prosecutor should, but for the juror's membership in a cognizable group, want to keep on the jury and vice versa. However, occasionally attorneys use challenges improperly as a strategic weapon in order to distract the opposing attorney or render the opposing attorney "gun shy" in exercising peremptory challenges against jurors who are unfavorably disposed to the opposing attorney but belong to the cognizable class at issue.

into consideration at the prima facie level. (**See** this bench memo at p. 4; ***People* v. *Wheeler*** (1978) 22 Cal.3d 258, 282.)

"Both court and counsel bear responsibility for creating a record that allows for meaningful review." (***People* v. *Lenix*** (2008) 44 Cal.4th 602, 621.) "When the prosecutor's stated reasons are both inherently plausible and supported by the record, the trial court need not question the prosecutor or make detailed findings. But when the prosecutor's stated reasons are either unsupported by the record, inherently implausible, or both, more is required of the trial court than a global finding that the reasons appear sufficient." (***People* v. *Stevens*** (2007) 41 Cal.4th 182, 193; ***People* v. *Silva*** (2001) 25 Cal.4th 345, 386.)

Although a judge may not be able to observe every gesture, expression or interaction relied upon by the prosecutor (i.e., the judge has a different vantage point, and may have, for example, been looking at another panelist or making a note when the described behavior occurred), the trial "court must be satisfied that the specifics offered by the prosecutor are consistent with the answers it heard and the overall behavior of the panelist." (***People* v. *Lenix*** (2008) 44 Cal.4th 602, 625.)

"The record must reflect the trial court's determination on this point (see *Snyder*, *supra*, 128 S.Ct. at p. 1209), which may be encompassed within the court's general conclusion that it considered the reasons proffered by the prosecution and found them credible." (***People* v. *Lenix*** (2008) 44 Cal.4th 602, 625-626.)

In sum, if the court is going to deny the challenge, it "should be discernible from the record that "1) the trial court considered the prosecutor's reasons for the peremptory challenges at issue and found them to be race-neutral; 2) those reasons were consistent with the court's observations of what occurred, in terms of the panelist's statements as well as any pertinent nonverbal behavior; and 3) the court made a credibility finding that the prosecutor was truthful in giving race-neutral reasons for the peremptory challenges." (***People* v. *Lenix*** (2008) 44 Cal.4th 602, 621.)

Some common issues that arise at the third stage of the ***Batson-Wheeler*** motion are discussed below:

In stating grounds for removing a juror, is the court or the prosecutor required to assume the juror's responses are true?

The fact that a juror provides an answer that "contradicts" the basis for the prosecutor's challenge does not mean the prosecutor's reason will be held pretextual. "[T]he prosecution is not required to accept at face value a prospective juror's assurance that, despite an answer indicating the contrary, she would have no problem being neutral." (***People* v. *Rushing*** (2011) 197 Cal.App.4th 801, 812; **see also *Rice* v. *Collins*** (2006) 546 U.S. 333, 341 [notwithstanding young juror's oral response she could be impartial, prosecutor entitled to believe juror's youth and lack of ties to the community would make her a bad juror for the prosecution]; ***People* v. *Cardenas*** (2007) 155 Cal.App.4th 1468, 1477 [prosecutor had legitimate reasons for removing a bilingual juror on grounds the prosecutor believed the juror would refuse to accept an interpreter's translation over the juror's own translation even though juror ultimately agreed to abide by interpreter's translation]; ***People* v. *Gutierrez*** (2002) 28 Cal.4th 1083, 1124 [prosecutor justified in removing a juror on grounds the juror might harbor bad feelings toward the police despite the juror's claim otherwise; prosecutor was entitled to disregard a juror's claim that her emotional state and stressful circumstances would not interfere with her ability to consider the evidence where the juror repeatedly referred to her "nerves" and to being under considerable stress, cried twice during voir dire, and the unduly "emotional" state of the juror was confirmed by the judge].) Numerous cases, for example, have held that a prosecutor is entitled to dismiss a juror who has had negative contacts with law enforcement the criminal justice system or have close relatives who had such negative contacts, notwithstanding the juror's assurances that the prior experiences would not impact the juror. (**See e.g**., ***People* v. *McKinzie*** (2012) 54 Cal.4th 1302, 1321-1322; ***People* v. *Avila*** (2006) 38 Cal.4th 491, 554-555; ***People* v. *Farnam*** (2002) 28 Cal.4th 107, 138; ***People* v. *Adanandus*** (2007) 157 Cal.App.4th 496, 505.)

In conducting a comparative analysis (see this bench memo, at p. 7), how "similarly situated" do the jurors used for comparison purposes have to be?

At the third stage of a ***Batson-Wheeler*** motion a trial court may a conduct a comparative analysis in deciding whether purposeful discrimination has been shown. A comparative juror analysis involves comparing "panelists who were struck with those who were allowed to serve or were passed by the prosecution before being ultimately struck by the defense." (***People v. Lomax*** (2010) 49 Cal.4th 530, 572, fn. 14.) If the proffered reason for striking a member of the cognizable class at issue applies just as well to an otherwise-similar

juror who is not a member of the cognizable class and that only the latter is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at the third step. (**See *People v. Lomax*** (2010) 49 Cal.4th 530, 572.)

However, courts must avoid simplistic or superficial comparisons: "overlapping responses alone are not enough to demonstrate purposeful discrimination." (***People v. Calvin*** (2008) 159 Cal.App.4th 1377, 1389, citing to ***People v. Lewis and Oliver*** (2006) 39 Cal.4th 970, 1020.) "To prove such a claim, a defendant must engage in a careful side-by-side comparative analysis to demonstrate that the dismissed and retained jurors were "similarly situated." (***People* v. *Calvin*** (2008) 159 Cal.App.4th 1377, 1389, citing to ***People* v. *Lewis and Oliver*** (2006) 39 Cal.4th 970, 1016-1024; **see also *People* v. *Watson*** (2008) 43 Cal.4th 652, 672-682 [rejecting numerous claims jurors were similarly situated for comparative analysis purposes where jurors compared were similar in some aspects but different in others].)

Two jurors may give similar answers on a given point but whether they are, in fact, comparable in the eyes of the attorneys will depend on "other answers, behavior, attitudes or experiences" make each more or less desirable. (***People* v. *Lenix*** (2008) 44 Cal.4th 602, 624.) "'Myriad subtle nuances' not reflected on the record may shape an attorney's jury selection strategy, 'including attitude, attention, interest, body language, facial expression and eye contact.'" (***People* v. *Hartsch*** (2010) 49 Cal.4th 472 [110 Cal.Rptr.3d 673, 695, fn. 16].)

The manner of a juror is often "more indicative of the real character of his opinion that his words." (***People* v. *Lenix*** (2008) 44 Cal.4th 602, 622.) The differences in the manner in how a juror answers a question "may legitimately impact the prosecutor's decision to strike or retain the prospective juror." (**Id**. at p. 623.) Moreover, "[w]hile an advocate may be concerned about a particular answer, another answer may provide a reason to have greater confidence in the overall thinking and experience of the panelist. Advocates do not evaluate panelists based on a single answer." (**Id**. at p. 631.)

Finally, whether a juror is acceptable or not acceptable will change over the course of jury selection because a lawyer is not only seeking a particular kind of juror but a particular mix of jurors. "It may be acceptable, for example, to have one juror with a particular point of view but unacceptable to have more than one with that view. If the panel as seated appears to contain a sufficient number of jurors who appear strong-willed and favorable to a lawyer's position, the lawyer might be satisfied with a jury that includes one or more passive or timid

appearing jurors. However, if one or more of the supposed favorable or strong jurors is excused either for cause or [by] peremptory challenge and the replacement jurors appear to be passive or timid types, it would not be unusual or unreasonable for the lawyer to peremptorily challenge one of these apparently less favorable jurors even though other similar types remain. These same considerations apply when considering the age, education, training, employment, prior jury service, and experience of the prospective jurors." (**Id**. at p. 623.)

V.
REMEDY FOR A *BATSON-WHEELER* VIOALATION

The traditional remedy/sanction for a ***Batson-Wheeler*** violation was laid out in ***People v. Wheeler*** (1978) 22 Cal.3d 258: "when either party in a criminal case succeeds in showing that the opposing party has improperly exercised peremptory challenges to exclude members of a cognizable group, the court must dismiss all the jurors thus far selected, and quash the remaining venire." (**Id**. at p. 282; ***People* v. *Willis*** (2002) 27 Cal.4th 811, 813.) This remedy was also recognized as one means of responding to an attorney's discriminatory use of a peremptory challenge in ***Batson v. Kentucky*** (1986) 476 U.S. 79, although the High Court expressed "no view on whether it is more appropriate in a particular case, upon a finding of discrimination against black jurors, for the trial court to discharge the venire and select a new jury from a panel not previously associated with the case . . . or to disallow the discriminatory challenges and resume selection with the improperly challenged jurors reinstated on the venire[.]" (**Id**. at p. 99, fn. 24.)

In ***People v. Willis*** (2002) 27 Cal.4th 811, the California Supreme Court noted that the sanction of dismissal for a ***Batson-Wheeler*** violation was not mandated by the federal Constitution and expressly approved of the use of other remedies for a ***Batson-Wheeler*** violation than simply dismissing the panel and restarting jury selection: A trial court, acting ***with the consent of the aggrieved party***, "has discretion to consider and impose remedies or sanctions short of outright dismissal of the entire jury venire." (***Willis***, at pp. 814, 821, emphasis added.) Among the suggested alternative remedies: reseating of the juror, imposition of monetary sanction, and (in dicta) allowing the aggrieved party additional challenges. (**Id**. at p. 821 [albeit suggesting, at p. 824, that imposing monetary sanctions may not effectively vindicate the interests impacted by the improper use of jury challenges].)

However, the remedy of reseating should not be imposed if the challenged juror has already been discharged. (**See *People v. Willis*** (2002) 27 Cal.4th 811, 823; ***People v. Muhammed*** (2003) 108 Cal.App.4th 313, 323 [noting trial court could not use the sanction of reseating bumped jurors because the prospective jurors had already been excused].) This remedy should only be imposed with the consent or assent of the aggrieved party. (***Willis***, at p. 823.) Although the defense may be deemed to have implicitly, rather than expressly consented to the remedy of reseating a juror by submitting to the trial judge's announcement of that remedy (the defendant himself has no personal right to express waiver of dismissal of the jury panel), it is preferable for a trial judge to seek express consent of the aggrieved party. (***People* v. *Overby*** (2004) 124 Cal.App.4th 1237, 1245-1246.) "[I]f the complaining party does effectively waive its right to mistrial, preferring to take its chances with the remaining venire, ordinarily the court should honor that waiver rather than dismiss the venire and subject the parties to additional delay." (***Willis***, at p. 824.) The ***Willis*** court seemed to suggest that alternative sanctions are most appropriately imposed in situations "in which the remedy of mistrial and dismissal of the venire accomplish nothing more than to reward improper voir dire challenges and postpone trial." (**Id**. at pp. 821, 824.)

There is a concern that if a challenged juror is kept on the jury after the juror has become aware he or she has been challenged, the juror might hold it against the attorney who exercised the challeng – a concern magnified if the juror figures out the challenge was disallowed because the attorney purportedly challenged the juror for improper reasons.

Accordingly, the ***Willis*** court approved the use of having peremptory challenges made at sidebar outside the jury's presence, followed by appropriate disclosure in open court as to successful challenges, so that any successful ***Wheeler*** objection could be ruled on, and any improperly challenged jurors retained, without revealing to them which party had attempted their removal. (***Willis*** at pp. 819, 821.)

DATED:

Respectfully submitted,
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By: _____

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